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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH
(DIVISION BENCH)

Criminal Appeal No.59 of 2001

Naresh & others

- Versus -

The State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. BHADOO
Judge

HON'BLE MR. JUSTICE DHIRENDRA MISHRA

Sd/-
DHIRENDRA MISHRA
Judge

POST FOR JUDGMENT ON /24-APRIL, 2006

Sd/-
L.C. BHADOO
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HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

DIVISION BENCH: -

HON'BLE SHRI L.C. BHADOO AND
HON'BLE SHRI DHIRENDRA MISHRA, JJ.

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The State of Chhattisgarh

Present: -

Shri H.B. Agrawal, Sr. Advocate
 with Shri Pankaj Agrawal, Advocate:

For appellants No.1 & 2.

Shri Manish Sharma, Advocate:

For appellant No.3.

Shri U.N.S. Deo, Addl. Public Prosecutor
 with Shri Akhil Mishra, Panel Lawyer:

For the State/respondent.

JUDGMENT

(Delivered on 12.4.2006 April, 2006)

The following judgment of the Court was delivered by **L.C. Bhadoo, J. -**

1. By this appeal under Section 374 (2) of the Cr.P.C. the accused/ appellants have questioned the legality and correctness of the judgment of conviction and order of sentence dated 1-1-2001 passed by the 1st Additional Sessions Judge, Raipur in S.T. No.211/99 whereby the learned Additional Sessions Judge after holding accused/appellants namely Naresh, Puran Singh and Dilip Kshatri guilty for commission of offence under Sections 394 read with section 397, 302 read with section 34 and 450 of the I.P.C., sentenced each of the accused to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo S.I. for 6 months under Section 302/34 of the I.P.C., and also under Section 394/397 of the I.P.C., and to undergo R.I. for 3 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 3 months under Section 450 of the I.P.C.. In addition to that, accused Puran and Naresh have also been convicted under Section 25 of the Arms Act and sentenced to undergo R.I. for 3 years and to pay a fine of Rs.200/- each, in default of payment of fine to further undergo S.I. for one month each. It has also been ordered that all the sentences imposed upon the accused persons shall run concurrently.

2. The case of the prosecution, in brief, necessary for the disposal of this appeal was that at Tatibandh, Raipur there was a liquor shop of Syndicate Company. Complainant Ashok Sharma, who was working in the said liquor shop, lodged Dehati Nalishi (Ex.-P/17) in the P.S. Amanaka Raipur to the effect that on 10-1-99 at about 9.05 p.m. Sanjay Gupta, Manager, after collecting the sale money of liquor amounting to Rs.22,000/-, sent the same with Syndicate Company's car, about 25-30 minutes thereafter 4 persons entered the liquor shop where Sanjay Gupta was sitting. Sanjay objected to them and said that if they want to purchase liquor, they can go to the counter. One person put the country made Katta on the chest of Sanjay Gupta and fired the shot, as a result of which Sanjay Gupta rolled down. The second person said 'bring the cash bag otherwise he will also be shot dead,' on which he replied that cash has already been sent with Company's car. He said that whatever amount is there same may be handed over to him. He stepped forward pulled the cash box and took out amount of Rs.4000-5000/- from the cash box. One person threw chilli powder in the eyes of Mithlesh, on which Mithlesh started raising cries. The person who fired the shot after ejecting the empty again loaded the Katta. Hearing the sound, Ballu and Ashok came. Sushil was already inside. All the accused persons threatened them with dire consequences at the Katta point and said that if they will come forward, they will also face the same consequence. All the four persons fled away from the scene of occurrence. Thereafter, he went to the STD/PCO booth and telephoned to the Syndicate Company. He came from Tatibandh Chowki to the shop on a motorcycle. Sushil took Sanjay to the hospital.
3. Receiving this report, Station House Officer, P.S. Amanaka, Raipur registered the F.I.R. (Ex.-P/27) at 10.15 p.m. and took up the investigation. However, Sanjay Gupta succumbed to the injuries. The Investigating Officer after giving notice, prepared Panchanama (Ex.-P/1) of the dead body of the deceased. The postmortem on the body of deceased Sanjay Gupta was conducted by Dr. Arvind Nirwalwar in Maikahara Hospital, Raipur. He prepared the postmortem report Ex.-P/10. Mithlesh was medically examined by Dr. K. Agrawal and his report is Ex.-P/12. The Investigating Officer took into possession one empty of 12 bore and chilli powder from the place of occurrence under Ex.-P/16. During the investigation, while in the police custody, accused Naresh gave a memorandum (Ex.-P/2) on 19-1-99 and in pursuance of that he got recovered one 12 bore country made Katta under Ex.-P/3, under Ex.-P/7

he got recovered Rs.540/-, under Ex.-P/4 one Katta of 0.315 bore was taken into possession from accused Puran. One Maruti Van bearing registration No.M.P.-23 L/2828, 8 empty pouches of country made liquor, one quarter of English wine, 5 pouches of country made liquor, one full pant, one shirt, one another shirt, half sleeve sweater which were lying in the Maruti Van were taken into possession from accused Dilip under Ex.-P/5. An amount of Rs.490/- was also taken into possession from accused Dilip under Ex.-P/6. The test identification parade for identification of accused persons Puran, Naresh and Dilip was conducted by PW-5 Pranav Singh, Naib Tehsildar. Witnesses namely Ashok Sharma, Vinod, Mithlesh, Ballu, Ashok Kumar Gupta and Sushil Kumar were asked to identify the accused persons. Witness Ashok Sharma identified Puran, Naresh and Dilip. Mithlesh identified Naresh and Dilip. Witness Ashok Gupta identified Naresh and Dilip. Witness Sushil also identified Naresh and Dilip. Witnesses Vinod and Ballu had not identified the accused persons. The identification memo Ex.-P/15 was prepared by PW-5 Pranav Singh. The recovered articles were sent to the Forensic Science Laboratory, Sagar under Ex.-P/20 from where reports Ex.-P/21, P/25 & P/28 were received.

4. After completion of the investigation, charge sheet was filed against these 3 accused/appellants in the Court of Judicial Magistrate, 1st Class, Raipur who in turn committed the case to the Sessions Judge, Raipur from where learned Additional Sessions Judge received the case on transfer for trial. However, the 4th accused could not be arrested and trial was concluded in his abscondence.
5. The prosecution in order to prove the charge examined 10 witnesses. On the other hand, statements of the accused persons were recorded under Section 313 of the Cr.P.C.. The accused persons denied the prosecution evidence appearing against them.
6. Learned Additional Sessions Judge after hearing arguments of respective counsel convicted and sentenced the accused/appellants as mentioned in para-1 of this judgment.
7. We have heard learned counsel for the parties.
8. The homicidal death of deceased Sanjay Gupta is not in dispute. Even the fact of commission of robbery is also not disputed by the learned counsel for the accused persons. •

9. Shri Manish Sharma, learned counsel appearing on behalf of appellant No.3, argued that as far as offence under Section 302/34 of the I.P.C. is concerned, as per the prosecution evidence fourth accused fired the shot on Sanjay Gupta, as a result of which he died. There is nothing on record to show that these 3 appellants were sharing common intention with fourth accused to commit murder of Sanjay Gupta. Any of these accused/appellants have not fired any shot nor they used any fire arm, therefore, finding of the trial Court convicting the accused/appellants under Section 302 with the aid of section 34 of the IPC for committing murder of the deceased is erroneous, illegal and not based on the settled legal principles. He also argued that as per the evidence of PW-7 Ashok Sharma and PW-8 Sushil Kumar, the allegation against accused/appellant Dilip is that he was standing at the gate, no overt act or participation in the crime, in any form, has been alleged against Dilip, as such his conviction under Sections 302/34 & 394 of the I.P.C. is erroneous. He further submitted that there is no allegation that accused Dilip used the fire arm, therefore, his conviction with the aid of section 397 of the I.P.C. is also erroneous. As he had not entered the premises, therefore, his conviction under Section 450 of the I.P.C. is also erroneous.
10. Shri H.B. Agrawal, learned Senior Counsel appearing on behalf of appellants No.1 & 2, adopting the argument of Shri Manish Sharma, argued that the main accused Ram Kumar Satnami has been acquitted of all the charges vide judgment dated 22nd April 2003, therefore, conviction of the accused/appellants is also bad and they are entitled for acquittal on the ground that the main accused has been acquitted in a separate trial. He also argued that there is contradiction in the evidence of PW-7 Ashok Sharma and PW-8 Sushil Kumar regarding taking away the liquor and currency notes. Elaborating the argument, he argued that PW-7 Ashok Sharma has stated in his evidence that accused Puran and Dilip were standing at the gate, whereas, PW-8 Sushil Kumar has stated that accused Puran had also looted the liquor pouches. In view of the contradictory evidence, their evidence cannot be believed. Therefore, conviction of the accused/appellants No.1 & 2 is also erroneous on all account and they deserve to be acquitted of all the charges. He also submitted that evidence of PW-7 Ashok and PW-8 Sushil do not inspire confidence and as per the F.S.L. report, there was no firing pin in the country made Katta recovered from accused Puran, therefore, same

cannot be used for firing, it does not come within the definition of fire arm, as such he has been wrongly convicted under Section 25 of the Arms Act.

11. Having heard the learned counsel for the parties, we have scrutinized the evidence, other material and the judgment of the trial Court. As far as conviction of the accused/appellants under Section 302 with the aid of section 34 of the I.P.C. is concerned, it is admitted position that as per the prosecution evidence Sanjay Gupta was shot dead by the 4th co-accused, therefore, the accused/appellants have been convicted under Section 302 with the aid of section 34 of the I.P.C.. In order to convict the accused persons with the aid of section 34, the prosecution is under the duty to establish that the accused persons who are sought to be convicted with the aid of section 34 were sharing common intention with the principal accused for commission of the crime under which they are sought to be convicted. The provisions of section 34 of the I.P.C. have been considered and examined by the Apex Court in a recent judgment in the matter of **Girija Shankar V. State of U.P.** reported in **2004 AIR SCW 810**. The Apex Court while examining section 34 of the I.P.C. held that:-

“Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under S.34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of S.34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true concept of Section 34 is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The Section does not say “the common intention of all”, nor does it say “and intention common to all”. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the

application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them."

The Apex Court in the matter of **Ashok Kumar V. State of Punjab** reported in **AIR 1977 SC 109** has held that:-

"The existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

In the matter of **Ch. Pulla Reddy and others V. State of Andhra Pradesh** reported in **AIR 1993 SC 1899** it was observed that:

"Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused."

Therefore, in order to attract the provisions of Section 34 of the I.P.C. the following points are relevant and necessary:-

- (i) Based on the proved facts and circumstances irresistible conclusion must be of existence of common intention and element of participation amongst the participants in a crime.
- (ii) It is not necessary that acts of several accused persons participating in a crime must be same and identically similar.
- (iii) The acts may be different in character, but they must be actuated by one and same common intention i.e. ultimate object of the criminals must be one.
- (iv) It is also not necessary to show some overt act on the part of the accused, it can be attracted even if no injury is caused by particular accused. However, he must be sharing common intention to commit crime.

12. Therefore, in view of the above principles enunciated by the Apex Court and looking to the requirement of Section 34 of the I.P.C., we have to scrutinize the evidence available on record and to find out as to whether the prosecution has been able to establish based on the proved facts and

circumstances that the accused/appellants were sharing intention with 4th accused to cause death of anyone during the commission of robbery. As per the evidence of PW-7 Ashok Sharma all the 4 accused persons came together in the liquor shop, on which Sanjay Gupta asked them that if they want to purchase the liquor, they can go to the counter, on which one person said that where is cash bag, on which the Manager tried to explain something but he fired the shot, as a result of which Sanjay fell down. One person threw chilli powder in the eyes of Mithlesh. While indicating towards accused Naresh he said that he threw chilli powder in the eyes of Mithlesh, whereas, the person who shot dead Sanjay Gupta remained standing at same place. Accused Naresh took out the money which was lying in the cash box. Accused Dilip and Puran remained standing at the gate. Accused Naresh took away the liquor pouches. PW-8 Sushil Kumar has stated that when they were preparing bundle of notes, accused Naresh came and he purchased a pouch of liquor from the counter and started consuming liquor. He again purchased a pouch of the liquor and left. Thereafter, bundle of currency notes were sent in a car. Ashok Sharma was selling the liquor at the counter. He came in the liquor shop. Mithlesh was cooking meal. He sat by his side and Sanjay was sitting there. In the mean time, 4 persons came in the shop, on which Sanjay said that if you want to purchase liquor, go to the counter. One person put the Katta on the chest of Sanjay Gupta and asked for handing over the cash, on which Sanjay said that cash has already been taken away by car, that person shot fire on his brother Sanjay which hit on the chest and he fell down. While indicating towards accused Naresh, he said that Naresh threw chilli powder in the eyes of Mithlesh and after climbing on the counter, he took out the money which was lying there. He also took the liquor pouches. Accused Puran also took the liquor pouches. The person who fired shot ejected empty from the Katta and again loaded the Katta. Accused Dilip was standing at the gate and thereafter all the 4 persons left the place brandishing Kattas.

13. As per the evidence of PW-1 Nar Singh and PW-9 A.S. Gil (I.O.) one country made Katta was recovered from the possession of Naresh under Ex.-P/3, one 0.315 Katta was recovered from accused Puran under Ex.-P/4, currency notes worth Rs.490/- were also recovered from accused Dilip, Rs.540/- were recovered from accused Naresh, Maruti car was recovered at the instance of accused Dilip in which liquor pouches which were looted from the liquor shop were recovered, therefore, we are of the

considered opinion that from the above evidence, it is established that all the 4 accused persons came together, entered the shop. The 4th accused shot dead Sanjay Gupta, Naresh and Puran also came armed with fire arms, Dilip also came with these persons at the night and they committed robbery in the liquor shop. In order to facilitate the robbery, 4th accused put the Katta on the chest of Sanjay Gupta and asked him to hand over the cash, when Sanjay replied that cash has already been sent by Company's car, he shot Sanjay dead then and there. Accused Naresh threw chilli powder in the eyes of Mithlesh and took away the cash and liquor pouches. Accused Puran also took away the liquor pouches and accused Dilip was standing at the gate, therefore, the manner in which the accused persons came with fire arms and also the manner in which they entered the shop, robbed the cash and liquor pouches while Dilip was standing at the gate, as per the evidence of PW-7 Ashok Sharma when Ballu was entering, one of the four persons said 'keep away otherwise he will be shot dead' and all the four persons fled from the scene together brandishing Kattas, therefore, the above proved facts and recovery of fire arms establishes the fact that all the four accused persons were sharing common intention to commit robbery and during that they used fire arms for committing and facilitating robbery. As three accused persons were armed with fire arms, they brought the fire arms in order to facilitate the robbery, therefore, all of them were sharing the intention that fire arms shall be used for commission of robbery and in that process, if necessary, murder may also be committed. It cannot be said that the accused/appellants were not sharing the intention with the 4th accused for using fire arms, as three of them came with fire arms, they entered the liquor shop together, left the shop together and out of four, one person fired the shot, 2nd person looted currency notes and liquor pouches, 3rd one also looted liquor pouches and 4th one was watching at the gate, therefore, from the acts of the accused persons it can safely be held that they were sharing common intention even to commit murder during the commission of robbery, as has been held by the Apex Court that the acts of accused persons may be different, but their objective was common and to achieve the same they played different roles.

14. As has been held in **Ch. Pulla Reddy's** case (Supra) that it is not necessary to show some overt act on the part of the accused. In that case evidence was that A-1 and A-2 were standing towards the head of the cot armed with knives. A-1 stabbed the deceased twice on his chest. A-2

along with A-1 had come armed with knives to the house of the deceased and both were present at the middle of the night near the head of the cot on which the deceased was lying when A-1 stabbed him twice in the chest and thereafter left together. Both A-1 and A-2 had thus, shared the common intention of causing the death of the deceased, as according to the medical evidence, the two stab injuries inflicted on the deceased on his chest were sufficient in the ordinary course of nature to cause death. Therefore, A-2 was held guilty for sharing intention to cause death with A-1 even though A-2 had not inflicted any injury, even then he was held guilty with the aid of section 34 of the I.P.C. The facts of the present case are also similar.

15. Hence the argument advanced by Shri Manish Sharma that accused Dilip was simply standing at the gate, therefore, he cannot be convicted with the aid of section 34 of the I.P.C. is without any basis and force in view of the foregoing discussion.
16. Now, coming to the argument of Shri H.B. Agrawal, learned Sr. Advocate, that accused Ram Kumar has already been acquitted by the judgment dated 22nd April 2003 in a separate trial, therefore, these accused/appellants are entitled for acquittal, but we are not convinced with the argument of learned Senior Counsel for the reason that 4th accused was absconding at the time of filing of the charge sheet against the accused/appellants, after completion and conclusion of the trial and conviction of these accused/appellants, Ram Kumar was apprehended and charge sheet was filed against him in which trial the witnesses namely Ashok and Mithlesh could not identify him, therefore, he was acquitted based on the subsequent evidence given by Ashok and Mithlesh and based on that the accused/appellants are not entitled for any benefit. It is not a case where Ashok and Mithlesh have stated that no incident took place. Moreover, in the present case witnesses Ashok & Sushil had clearly identified the accused/appellants and stated that the accused/appellants committed robbery and they were part of the robbers. Just after the arrest of accused persons, for their identification a test identification parade was conducted in presence of PW-5 Pranav Singh, Tehsildar. After completion of parade, he prepared the memo Ex.-P/15 which has been proved by PW-5 Pranav Singh. During the parade, PW-7 Ashok Sharma identified all the appellants and Sushil identified Naresh & Dilip. In the Court also these witnesses had identified the appellants. Moreover, recoveries of fire arms, cash, liquor pouches were effected from

the appellants, therefore, evidence of PW-7 Ashok Sharma and PW-8 Sushil inspire full confidence of the Court, as their evidence about the involvement of accused/appellants is consistent and reliable. As far as the argument of Shri Agrawal that there is contradiction in the evidence of PW-7 Ashok and PW-8 Sushil is concerned, after careful scrutiny of the evidence of these witnesses, we do not find any substance in this argument. The only discrepancy pointed out is that Ashok has stated that two persons were standing at the gate, whereas PW-8 Sushil has stated that accused Puran also looted the liquor pouches. But, such difference can occur on the ground that when Sanjay Gupta was murdered, accused persons were looting cash and liquor pouches at the point of Katta and in that process everyone was terrified, therefore, PW-7 Ashok might not have been able to observe Puran while taking away liquor pouches as everything was happened in a small fraction of time. Therefore, they are not entitled for any benefit of a separate judgment passed in the case of Ram Kumar. From the evidence of these two witnesses, it is established that the accused/appellants were sharing common intention to commit robbery.

17. The decision in each case has to be taken on the evidence adduced in that case. The decision of Ram Kumar depended upon the evidence adduced in that case while the case of accused/appellants, who have appealed before this Court, has to be decided only on the basis of evidence adduced during the trial of these accused/appellants. Therefore, the decision of Ram Kumar based on the evidence adduced in that case is wholly irrelevant in this appeal considering the merit of the case of appellants because the decision in each case has to turn on the evidence adduced in it. For this view, we are fortified by the judgment of Apex Court in the matter of **Karan Singh Vs. The State of Madhya Pradesh** reported in **AIR 1965 SC 1037**, in which there were in all 8 accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial Court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with Section 149, IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused-Ram Hans was apprehended and put on trial and upon its conclusion, the trial Court recorded order of his acquittal, which attained finality, no appeal having been preferred

against the same. Thereafter, when the appeal of accused-Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused-Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149, IPC could not be sustained, moreso when other six accused persons, who were tried with Karan Singh, were acquitted by the trial Court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence adduced came to the conclusion that murder was committed by Ram Hans in furtherance of the common intention of both himself and accused-Karan Singh and, accordingly, altered the conviction of Karan Singh from Section 302/149 to one under Section 302/34 IPC. Against the said judgment, when an appeal by special leave was preferred before the Supreme Court, it was contended that in view of the verdict of acquittal of accused Ram Hans, it was not permissible in law for the High Court to uphold conviction of accused Karan Singh. The Apex Court, repelling the contention, held that decision in each case had to turn on the evidence led in it. Case of accused-Ram Hans depended upon evidence led there while the case of accused-Karan Singh, who had appealed before the Supreme Court, had to be decided only on the basis of evidence led during the course of his trial and the evidence led in the case of Ram Hans and the decision there arrived at would be wholly irrelevant in considering merits of the case of Karan Singh.

18. But conviction of these accused/appellants under Section 394 with the aid of Section 397 of the I.P.C. cannot be sustained, as Section 397 of the I.P.C. has no application in this case because this Section postulates that "If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years." There is no evidence against these accused/appellants that they used the fire arms or caused grievous hurt or attempted to cause death or grievous hurt, therefore, their conviction with the aid of Section 397 of the I.P.C. cannot be sustained. They ought to have been convicted under Section 394 of the I.P.C. which postulates that "If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall

also be liable to fine." From the evidence of PW-7 Ashok Sharma and PW-8 Sushil Kumar, it is evident that while committing robbery one of the accused committed murder of Sanjay Gupta and apart from that, accused Naresh caused hurt to Mithlesh by putting chilli powder in his eyes, therefore, hurt was caused voluntarily while committing robbery by one of the members of the accused party, as such the accused/appellants must be convicted under Section 394 of the I.P.C. as they were jointly concerned in the robbery.

19. As far as their conviction under Section 450 of the I.P.C. is concerned, as all the 4 accused persons entered the liquor shop and committed robbery, therefore, they have been rightly convicted under Section 450 of the I.P.C. as they had committed house trespass which is a serious offence punishable with imprisonment for life.

20. Now, coming to the question that the country made Katta which was recovered from accused Puran was not having fire pin, therefore, same cannot be termed as fire arm, arguments advanced by learned counsel have some merit for the reason that when Katta was recovered at the instance of accused Puran, there was no firing pin in the Katta in order to use the same to fire the shot. The prosecution has not adduced any evidence nor the Investigating Officer has stated anything that at the time of commission of robbery firing pin was in the Katta, but the same was either deliberately taken out by the accused in order to mislead the prosecution or the same was fell somewhere else while handling the Katta. Therefore, conviction of accused Puran under Section 25 of the Arms Act cannot be sustained. However, accused Naresh was carrying Katta (fire arm) without any valid licence, therefore, he has rightly been convicted under Section 25 of the Arms. Act.

21. No other argument was advanced by learned counsel for the appellants.

22. In the result:-

- (i) As far as conviction and sentence imposed upon the accused/appellants under Sections 302/34 and 450 of the I.P.C. are concerned, we do not find any illegality or infirmity in the judgment of the trial Court, therefore, same are maintained.
- (ii) Conviction of accused Naresh under Section 25 of the Arms Act is maintained.
- (iii) Conviction and sentence imposed upon the accused/appellants under Section 394 read with Section 397 of the I.P.C. are set aside, instead thereof each of the accused/appellants is convicted under Section 394 of the I.P.C. and sentenced to

undergo R.I. for 7 years and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 6 months.

- (iv) The appeal of accused Puran to the extent of his conviction and sentence under Section 25 of the Arms Act is allowed and he is acquitted of that charge.
- (v) The accused persons shall be entitled for the benefit of Section 428 of the Cr.P.C. for set off for the period of their detention during investigation, trial and appeal.

Sd/-
L.C. BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Barve